

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,

Plaintiff,

v.

REX A. HOPPER,

Defendant.

Case No. 17-cr-40034-JPG

MEMORANDUM AND ORDER

This matter is before this Court on defendant Rex A. Hopper's motion to supplement the record on appeal pursuant to Federal Rule of Appellate Procedure 10(e)(2)(B) (Doc. 114). Before trial, the Court considered the issue of whether to allow defense counsel to use Government witnesses' proffer letters during cross-examination and ruled that they would not be allowed. In making this determination, the Court considered the entirety of the Government's standard form letter. However, during an offer of proof during trial, only the first page of the standard letter was admitted as Exhibit 73 to preserve the record to challenge the pretrial ruling. Hopper now asks the Court to supplement the record with the rest of the letter, and the Government does not object.

The record on appeal in all cases consists solely of "(1) the original papers and exhibits filed in the district court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk." Fed. R. App. P. 10(a). Generally, modification of a record on appeal is not permitted. Rule 10(e) is a limited exception to this general rule. It allows correction or modification "[i]f any difference arises about whether the record truly discloses what occurred in the district court[.]" Fed. R. App. P. 10(e)(1). When it arises, "the difference must be submitted to and settled by [the district] court and the record conformed accordingly." *Id.* "This rule is meant to ensure that the record reflects what really happened in the district court, but 'not to enable the losing party to add new material to the record in order to collaterally attack the trial court's judgment.'" *United States v.*

Banks, 405 F.3d 559, 567 (7th Cir. 2005) (quoting *United States v. Elizalde-Adame*, 262 F.3d 637, 641 (7th Cir. 2001)).

Because the Court actually considered the additional material Hopper now seeks to add to the record when it made its pretrial ruling, inclusion of that material is appropriate. Accordingly, the Court **GRANTS** the motion to supplement the record (Doc. 114) and **DIRECTS** the Clerk of Court to include in the record on appeal as Exhibit 73 the supplemental material Hopper tendered as an exhibit to the motion to supplement.

IT IS SO ORDERED.

DATED: August 1, 2018

s/ J. Phil Gilbert
J. PHIL GILBERT
DISTRICT JUDGE